No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

—v.—

COMMON CAUSE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SUPPLEMENTAL BRIEF OF THE *COMMON CAUSE* APPELLEES

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TABLE OF CONTENTS

Page

I. *Benisek v. Lamone* 1

II. 2018 Congressional Election Results 3

TABLE OF AUTHORITIES

Page(s)

Cases

Benisek v. Lamone,
138 S. Ct. 1942 (2018) 1

Benisek v. Lamone,
No. 1:13-cv-03233, 2018 U.S. Dist.
LEXIS 190292 (Nov. 7, 2018)..... 1, 2, 3

Constitutional Provisions

U.S. Const. amend. I..... 1, 2

Pursuant to Sup. Ct. R. 18.10, *Common Cause* Appellees file this supplemental brief to bring to the Court's attention (1) yesterday's decision of the United States District Court for the District of Maryland in *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2018 U.S. Dist. LEXIS 190292 (Nov. 7, 2018); and (2) the results of the November 6, 2018 congressional elections conducted under the challenged 2016 Plan.

I. *Benisek v. Lamone*

In *Benisek*, "several Republican voters ... allege[d] that Maryland's Sixth Congressional District was gerrymandered ... for the purpose of retaliating against them for their political views." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam). The district court denied preliminary injunctive relief in August 2017, and this Court affirmed, finding no abuse of discretion. *Id.* at 1944.

Subsequently, at the conclusion of "extensive discovery," the plaintiffs moved for summary judgment. 2018 U.S. Dist. LEXIS 190292, at *3. Yesterday, the district court granted that motion, holding unanimously that the plaintiffs' claims were justiciable; that the plaintiffs had standing to bring those claims; and that, in drawing the challenged district, the state defendants "violate[d] the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history." *Id.* at *4.

The *Benisek* court's analysis reinforces many of *Common Cause* Appellees' arguments in their Motion to Affirm. The court recognized that voters "have a

right under the First Amendment not to have the value of their vote diminished *because of* the political views they have expressed through their party affiliation and voting history." *Id.* at *46 (emphasis in original). The essence of the violation, the court underscored, is the drawing of district lines "with the *specific intent* to impose a burden on [plaintiffs] ... because of how they voted or the political party with which they were affiliated." *Id.* at *47 (emphasis in original). Once such intent has been proven, it is sufficient to show that the conduct "resulted in a tangible and concrete adverse effect" on the plaintiffs' representational or associational rights. *Ibid.* "[A] plaintiff ... need not show" that the gerrymander actually "altered the outcome of an election." *Id.* at *59; *see also id.* at *83 (Bredar, C.J., concurring) ("[N]o mention of electoral outcomes is necessary to prove such a violation....").

The *Benisek* court found the specific intent requirement met based on, *inter alia*, the admissions of Maryland's governor and Senate Majority Leader; remarks made by legislators during the redistricting process; and the map-drawer's use of a "Democratic Performance Index" metric in plotting district lines. *Id.* at *13, *53-56. Here, there is similar evidence of invidious intent—and, in addition, the 2016 redistricting guidelines are also invidiously discriminatory *on their face*. Mot. to Affirm 5-7, 27. The *Benisek* court also found the adverse effect requirement met based on, *inter alia*, evidence that "Republican voters in the [gerrymandered] Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting," 2018 U.S. Dist. LEXIS 190292, at *59-61, and testimonial

evidence that the gerrymander "burden[ed] their associational rights" by impeding "fundraising" and dampening "voter engagement," *id.* at *69-72; *see also id.* at *84-85 (Bredar, C.J., concurring). The District Court relied on analogous evidence here. Mot. to Affirm 34, 37.

Notably, in his concurring opinion, Chief Judge Bredar observed that the "line-drawing" critique Appellants raise in their Jurisdictional Statement is misplaced—at least in the context of an associational-rights claim—because "*any* [intentional] retaliation against a voter based on his or her affiliations is a constitutional violation." 2018 U.S. Dist. LEXIS 190292, at *81-82, *86-87 (emphasis added). A standard that turns on invidious intent, therefore, "does not pose ... justiciability problems," the way a standard that turns on measures of electoral impact has been claimed to do. *Id.* at *83 n.2. Likewise here, *Common Cause* Appellees have shown that a standard based on invidious intent obviates the need for arbitrary line-drawing and is well within the judiciary's competence to apply. Mot. to Affirm 28-30.

II. 2018 Congressional Election Results

Common Cause Appellees also bring to the Court's attention the results of the 2018 North Carolina congressional elections conducted earlier this week under the 2016 Plan.[1]

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[1] Figures include election-night totals only and exclude provisional ballots. Data were obtained from the website of the State Board of Elections. *See* https://www.ncsbe.gov/election-results.

The overall vote share was approximately 50.3% for Republican candidates and 48.4% for Democratic candidates. Despite these near-equal vote shares, Republican candidates once again won 10 seats (77%), and Democratic candidates only 3 seats (23%)—just as prescribed in the 2016 Plan's "Partisan Advantage" criterion. Mot. to Affirm 6. In reality, the distortive effect of the Plan was even greater than it appears, since no Democratic candidate was even willing to run in the Plan's Congressional District ("CD") 3. In the twelve contested races, Democratic candidates won a *majority* of the total vote—approximately 50.9%—but only 3 of 12 seats (25%). These results highlight the persistent harm inflicted by the 2016 Plan and validate the District Court's undisputed finding of fact "that the dilution of the votes of [the *Common Cause* voter-plaintiffs] ... is likely to persist in subsequent elections." Mot. to Affirm 36-37.

In the three districts the District Court found to be "packed" (CDs 1, 4, and 12), the victorious Democratic candidates won in overwhelming landslides (69.8%, 75.0%, and 73.0% of the district-wide vote, respectively). By contrast, none of the nine Republican winners of contested races exceeded 59.3% of the district-wide vote, with an average of 55.1%. These results underscore the extent to which Democrats were intentionally "'packed' into three specific districts (CD 1, 4, and 12)" in order to waste their votes, "and 'crack[ed]' ... across the remaining ten." Mot. to Affirm 17.

Respectfully submitted,

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